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In the Supreme Court of the United States

October Term, 1983

THE CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO,
Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Section 1152 Panel of the Special Court of the United States, Regional Rail Reorganization Act

C. RICHARD GRIESER, *Counsel of Record*
MARK A. ADAMS
GRIESER, SCHAFER, BLUMENSTIEL & SLANE Co., L.P.A.
261 West Johnstown Road
Columbus, Ohio 43230
Telephone: (614) 475-9511
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED FOR REVIEW

Whether Congress violated the "due process" and "equal protection" components of the Fifth Amendment to the United States Constitution by passing the last clause of Title 45, U.S.C., Section 797j, which purports to exempt all non-profitable *and profitable* railroads, in the statutorily defined region, from state laws requiring the operation of trains with full crews (or the payment of protective benefits in lieu thereof), when said section (a) has absolutely no legislative history to support it, (b) apparently resolves an issue which has been unsuccessfully debated in and out of Congress for over twenty years, and (c) is contrary to the explicit goals, purposes, and objectives of both the Regional Rail Reorganization Act and the Northeast Rail Service Act.

PARTIES TO THE PROCEEDINGS BELOW

A. Respondent and Plaintiff—Norfolk and Western Railway Company

B. Defendants—Public Utilities Commission of Ohio; Michael Del Bane, Chairman and Commissioner of the Public Utilities Commission of Ohio; and William Brooks, Commissioner of the Public Utilities Commission of Ohio

C. Petitioner and Intervenor—The Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio

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OPINION OF THE SPECIAL COURT BELOW

The opinion of the Special Court from which this petition arises is set out in the Appendix as Appendix A. To petitioner's knowledge, it has not been given any official citation as of this time.

JURISDICTION OF THE COURT

Petitioner is seeking review of an order of the Special Court granting a motion for summary judgment filed by the plaintiff, Norfolk and Western Railway Company. The order granting the motion for summary judgment was filed on March 29, 1984, and was duly entered at that time.

Petitioner, intervenor below, seeks review by this Court pursuant to Title 45, U.S.C. Section 1105(b) (set out in the Appendix at Appendix D). By the terms of the foregoing provision, plaintiff has twenty days after the entry of any order within which to petition this Court for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

2. Petitioner also refers the Court to Appendices D and E in which the following statutes are fully set forth: Title 45, U.S.C., Sections 701, 797j, 1101, 1102, 1103, and 1105, and Ohio Revised Code Section 4999.20.

The foregoing statutory provisions have been set forth in the Appendix because of their length.

STATEMENT OF THE CASE

On October 27, 1982, petitioner, the Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio (hereinafter petitioner or "Co-Op") filed a complaint with the Public Utilities Commission of Ohio (hereinafter PUCO) essentially stating that the Norfolk and Western Railway Company (hereinafter N&W) had violated Ohio Revised Code Section 4999.20 on two occasions by operating trains without a fireman when firemen with seniority dates adequate to invoke the protection of Section 4999.20 were available for employment. (Ohio Revised Code Section 4999.20 is set forth in Appendix E.)

The PUCO investigated the complaints and ultimately commenced formal proceedings against the N&W ordering the N&W to reply to the Co-Op's complaint. Instead, the N&W filed a complaint in the Special Court on February 25, 1983, seeking a temporary and permanent injunction against the PUCO and a declaratory judgment that Section 4999.20 of the Ohio Revised Code was pre-empted by Title 45, U.S.C., Section 797j (Section 711 of the Regional Rail Reorganization Act). Shortly after the filing of the complaint by the N&W the Co-Op moved to intervene in the case and said motion was granted by the Special Court.

On March 22, 1983, the PUCO filed a motion to dismiss the complaint contending that the Special Court did not have jurisdiction over the matter and was without power to enjoin proceedings before the PUCO. This motion was denied by the Special Court on May 25, 1983 (Appendix B).

Ultimately, on December 7, 1983, the N&W filed a motion for summary judgment and a motion for prelimi-

nary injunction. In response to the motion for preliminary injunction, the Special Court ordered a stay of the PUCO proceedings on December 22, 1983 (Appendix B).

An oral hearing before the Special Court was conducted on January 20, 1984, with respect to the N&W's motion for summary judgment. Finally, on March 29, 1984, the Special Court granted the motion for summary judgment filed by the N&W although it denied the N&W's request for an injunction (Appendix C). The Co-Op now seeks review of the Special Court's order granting the motion for summary judgment.

This case involves the interpretation of Title 45, U.S.C., Section 797j which provides:

"Preemption

> No State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation, the National Railroad Passenger Corporation, or the Amtrack Commuter Services Corporation to employ any specific number of persons to perform any particular task, function, or operation, or requiring the Corporation to pay protective benefits to employees, and no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to any railroad in the Region."

The N&W contends that the above statutory provision pre-empts the Ohio Revised Code Section 4999.20, and that the N&W, therefore, is not obligated under Ohio state law to man its trains with firemen who have a seniority date specifically protected by the Ohio statute.

In fact, the only provision of Section 797j applicable to the N&W is the last clause of the foregoing provision

and it is this sentence that the Co-Op believes is unconstitutional. The Co-Op believes that the last clause of Section 797j violates the "due process" and "equal protection" components of the Fifth Amendment to the United States Constitution. With respect to the due process argument, the Co-Op believes that the foregoing provision is arbitrary and capricious because it resolves an issue which has been unsuccessfully debated in and out of Congress for over twenty years without ever having any public hearing or public discussion of the matter, and is contrary to the explicit goals, purposes, and objectives of both the Regional Rail Reorganization Act (hereinafter 3-R Act) and the Northeast Rail Service Act (hereinafter NRSA). The Co-Op additionally believes that the foregoing provision sets up irrational classifications of railroad workers since employees of profitable railroads within the statutorily defined region are detrimentally affected by the statute, yet employees of either the same raliroad or other railroads not within the statutorily defined region may avail themselves of such "full crew" statutes.

Most importantly, this Court should review this statute because it has absolutely no history to support it, and to uphold its constitutionality will set forth the precedent that any piece of congressional legislation involving economic rights or duties is constitutional merely because Congress passes it rather than on its "rational basis" in relation to its stated objectives. In other words, if the constitutionality of Section 797j is upheld, this Court will be immunizing all social and economic legislative enactments from judicial review. The Co-Op believes that such a tautological approach is not, and should not be, sufficient analysis of social and economic legislation.

REASONS FOR GRANTING THE PETITION

The facts and issue of this case are very simple. The question is whether or not Title 45, U.S.C., Section 797j unconstitutionally violates the due process and equal protection components of the Fifth Amendment. The Co-Op concedes that Section 797j is part of a much larger economic piece of legislation. The Co-Op is also aware of the long-standing history of this Court in upholding economic legislation challenged on the basis of due process or equal protection. This history obviously runs from the days of the Great Depression when the Court at that time utilized substantive due process to strike down numerous pieces of New Deal legislation. In fact, in the fifty years since the Great Depression, any constitutional lawyer would be hard pressed to find any precedent for holding a piece of economic legislation unconstitutional as violating the due process clause of the Fifth Amendment.

The Co-Op believes that the Court's analysis has, quite frankly, developed into a strictly tautological approach which avoids the necessity for evaluating the relationship between the challenged legislation and its stated purpose. In short, economic legislation today is held constitutional merely because Congress intended to do what it did in the legislation. The analysis has been reduced to affirmance of constitutionality based on post hoc justifications offered by either the government or other attorneys, and embraced by the courts below, as the rational basis for the legislation.

The case presented here for review represents a classic example. If this Court denies this petition for certiorari, it will be upholding a legislative enactment that has absolutely no legislative history to support it, is contrary to

the objectives and purposes of the statute in which it is found, and resolves, without discussion, an issue that has eluded congressional action for over twenty years.

By pre-empting state full crew laws and their progeny, Section 797j has resolved an issue which has been hotly debated since 1960. The history of the manning of trains has been set forth in various cases, but is most comprehensive in the cases of *United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. 697 (Regional Rail Reorganization Court 1982), *cert. denied*, 102 S. Ct. 960 (1982) and *Chicago & Northwestern Railroad Co. v. United Transportation Union*, 402 U.S. 570 (1971). Despite all of the continuing problems and difficulties obvious from this history, the congressional action in passing the last sentence of Section 797j (with respect to all profitable railroads within the region) was performed without any public hearing or any public debate. Indeed, the foregoing provision of Section 797j was not included in either the House or the Senate version of the bill. It is very apparent that it was, as the Special Court stated below, put in "at the eleventh hour." However, the Court below uses its own post hoc justifications to improperly support the constitutionality of the provision.

Initially, it is important to note that there is no legislative history specifically with respect to the relevant portion of Section 797j. It is something of a mystery as to how the final clause of Section 797j ever came into existence. However, it is known that the Northeast Rail Service Act itself was part of Public Law 97-35 passed on August 13, 1981, as part of the Omnibus Budget Reconciliation Act of 1981. This budgetary act included twenty-seven titles, only one of which had anything to do with the railroad industry. Title 11 of this Act ultimately included the Northeast Rail Service Act as amended by a

House-Senate Conference Committee on July 29, 1981. Prior to that Conference Committee report, the Senate version of the bill (contained in 1981 U.S. Code Congressional Administrative News, pp. 605-633) revealed nothing which would reflect an intention on the part of the Senate to pre-empt or abolish state full crew laws or laws providing for the "phase out" of such full crew laws.

Interestingly, the House version of this section was contained in what was once known as the Rail Service Improvement Act of 1981. In fact, the Court below referred to the House Committee Report in support of the notion that Congress intended to pre-empt "phase out" laws. However, the Court conveniently left out the most important part of that legislative history regarding that particular provision. *In its entirety, the legislative history states as follows*:

> "Section 711 preempts any state law, rule, or regulation requiring *Conrail, Amtrak, or their commuter subsidiaries* to hire specified numbers of persons for particular tasks. The Committee specifically intends to preempt any state full crew laws which require crews to contain certain numbers or certain provisions, and any state laws which phase out such requirements. *Given the dire circumstances of these rail transportation corporations, such a preemption is necessary*" (Emphasis supplied) H.R. Rpt. Rep. No. 97-153, 97th Congress First Session p. 30 (1981)

Thus, while the Court below took one quote out of context in support of the notion that Congress intended to reach "phase out" laws by Section 797j, the Court conveniently ignored the fact that the legislative history implicitly referred to the need for such pre-emption only with respect to those railroads who were having "dire

circumstances." This is an implicit recognition that Congress intended only to benefit *non-profitable railroads* with the pre-emption provision. Nevertheless, the Court below failed to acknowledge this history and, indeed, took a quote out of context in order to support the position that Congress intended otherwise.

The foregoing is the sum total of any legislative history with respect to the particular clause of Section 797j here involved. There never has been any identifiable congressional intention behind the passage of the last clause of Section 797j. In fact, the foregoing quote from the Rail Service Improvement Act of 1981 clearly indicates at least an implicit intention not to benefit profitable railroads with the pre-emption provision. This inconsistency between the implicit history and the ultimate result clearly makes the validity of the last clause of Section 797j unreasonable, arbitrary and capricious. This is particularly true when the last clause of Section 797j is compared to the stated goals, purposes and objectives of both the 3-R Act and NRSA.

Set forth in Appendix D are the stated purposes, goals, findings, and objectives of both the 3-R Act and NRSA. Review of these statements by Congress clearly demonstates that the congressional intent behind the 3-R Act was to establish ConRail and give it numerous economic advantages in order to make it a viable railroad. Congress recognized that "essential rail service" in the mid-West and northeast region was being provided by railroads which were insolvent and attempting to undergo reorganization. Consequently, Title 45, U.S.C., Section 701(b)(2) stated that it was the purpose of Congress in passing the 3-R Act to provide for the "reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service

to the region." In rejecting the Co-Op's argument below, the Special Court referred to the preservation of "essential rail service" as stated in Section 701 in support of its position that Congress somehow intended to promote the economic well being of all railroads in the relevant area. This clearly is nothing more than a distorted effort on the part of the Court to find some justification for a clause that in fact directly contradicted the objectives of the statute. The quote "essential rail service" found in Section 701, and relied upon by the Court below, was initially stated in Section 701(1) referring to the fact that "essential rail service" was being provided by insolvent and reorganizing railroads. By taking a three word quote out of the congressional findings, the Court below semantically sidestepped the major thrust of the statute in favor of a more limited, but self-serving, justification for upholding the constitutionality of the last clause of Section 797j.

In fact, the Court below completely ignored the stated goals and objectives of the Northeast Rail Service Act set forth in Title 45, U.S.C., Section 1101-1103. These sections are set forth in their entirety in Appendix D. Section 1102 specifically states the purpose of Congress in passing the Northeast Rail Service Act. Of the three reasons listed for the passing of the statute, none of them relate to profitable railroads. *All of them* relate to ConRail. The goals and objectives set forth in Section 1103 of the Northeast Rail Service Act also clearly relate to ConRail and its employees. It is of particular importance to note that Section 1103(4) directs ConRail to enter into collective bargaining agreements with its employees to reduce ConRail's costs by over two million dollars. Nevertheless, the Court below failed to even acknowledge these stated purposes of the Northeast Rail Service Act which gave rise to Section 797j.

Thus, it is very clear from the foregoing explicit goals and purposes of these statutes that the last clause of Section 797j is in no way related to any of those stated purposes or objectives. Quite to the contrary, the only legislative history regarding pre-emption of full crew laws indicates that Congress intended for the benefit of that pre-emption to go to ConRail and not to other profitable railroads in the region. As such, the foregoing clause of Section 797j is unreasonable, arbitrary and irrational and should be held to violate the due process clause of the Fifth Amendment to the Constitution.

The Co-Op also believes that Section 797j violates the equal protection component of the Fifth Amendment. Obviously, there are a number of classifications of the employees affected by the legislation in this case. First, and perhaps most obvious, is that ConRail's employees are by the very nature of the 3-R Act and the Northeast Rail Service Act given special treatment and benefits that other railroad employees do not obtain. These benefits are given in return for sacrifices made by the employees both in terms of their wages and in terms of whether or not they will be terminated by the corporation. Without question there is a rational basis for Congress to separate the ConRail employees from all other railroad employees and treat them differently within the confines of the purposes and objectives of these statutes. Again, the basis for congressional action in this regard is either the profitability of ConRail, or its ultimate dismantlement.

However, the classification of employees under the last clause of Section 797j is not substantiated by such a rational basis for discrimination. Essentially, there are two classifications at issue here. First, N&W employees are discriminated against since they will have to give up jobs, seniority rights, vacation or fringe benefits due to

the abolishment of Section 4999.20 in Ohio. The only basis for this is that Ohio is one of the states in which Section 797j allegedly applies. See the definition of "region" in Title 45, U.S.C., Section 702(17). Indeed, any state not within the region can presumably pass a full crew law which is totally unaffected by Section 797j, therefore, allowing employees of other "nonregion" railroads to have the full benefits of such laws. While such discrimination makes sense when the purpose is to protect and aid in the viability of ConRail, there is no rational basis in protecting and aiding already profitable railroads and giving them the same cost reductions as have been permitted to ConRail.

Again, the findings and goals of these statutes clearly indicate the efforts by Congress to turn non-profitable railroads into competitive profitable railroads by federal mandate. However, there is no rational basis for discriminating against profitable railroad employees within the region and profitable railroad employees outside of the region for any reason.

Additionally, Section 797j discriminates against N&W employees working within the "region" vis-a-vis other N&W employees who are working outside of the region. Obviously, states not within the region can pass mandatory full crew laws to benefit and protect employees of railroads in those states. Further, with the number of large rail mergers that have occurred in the recent past, most notably the N&W-Southern merger, employees of the states not within the region could easily be protected by such laws while the employees of the very same railroad working within the region would be deprived of that protection. Again, this type of discriminatory classification only makes sense when the intent of the discrimination is to aid a railroad in financial trouble and to which Congress has already invested enormous sums of money.

Consequently, because the last clause of Section 797j invidiously and irrationally discriminates against employees of profitable railroads within the region for no rational reason, this provision violates the equal protection component contained in the due process clause of the Fifth Amendment to the United States Constitution. As such, this clause should be invalidated.

Recently, in the case of *United States Railroad Retirement Board v. Fritz*, 101 S. Ct. 453 (1980), Justices Brennan and Marshall dissented from the Court's affirmance of the constitutionality of the grandfather provision of the 1974 Railroad Retirement Act. That dissent tellingly points out the tautological approach favored by courts today in reviewing the constitutionality of social and economical legislation. In essence, Justice Brennan suggested that closer scrutiny and analysis must be made of congressional economic legislation if the due process clause of the Fifth Amendment is to have any significant meaning in that regard. If the Court merely relies on the language of the statute and presumes that Congress intended to do what in fact it did, every statute, no matter how arbitrary or irrational, would have to be upheld against constitutional attack. However, as Justice Brennan pointed out, the Court should first deduce the independent objectives of the statute from the statements of purpose and other evidence in the statute and legislative history, and then determine whether the challenged provision is rationally related to those objectives. In other words, this Court must look for more than any conceivable basis upon which it can base a finding that the provision is rationally related to the objective. If any conceivable basis will suffice, then attorneys and lower courts need only go so far as to state post hoc that Congress intended to do what it said because the language of the statute says so.

When a statute fails to have any legislative history to support a provision of it and where that provision purports to resolve a problem that could not successfully be resolved for over twenty years, and where the purported resolution of the problem flies in the face of the stated goals, objectives and purposes of the statute, then the time has come for this Court to do more than superficially affirm the designed justifications of the court below used to sustain the constitutionality of the provision involved. This case is a clear case where the Court can decide whether it wishes to continue the tautological approach of the past and affirm economic legislation without scrutinizing its content, or to return some meaning to the term "rational basis," and invalidate a provision that has no support in legislative history and no support from the stated goals and purposes of the statute. The Co-Op believes that the latter path is the proper path for this Court to follow.

CONCLUSION

On the basis of the foregoing, the Co-Op requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

C. RICHARD GRIESER, *Counsel of Record*
MARK A. ADAMS
GRIESER, SCHAFER, BLUMENSTIEL & SLANE Co., L.P.A.
261 West Johnstown Road
Columbus, Ohio 43230
Telephone: (614) 475-9511
Attorneys for Petitioner

APPENDIX A

Opinion of Special Court, Regional Rail Reorganization Act

(Filed March 29, 1984)

C.A. No. 83-2

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
§ 1152 Panel

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Defendants,

and

THE CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO,
Intervenor.

MEMORANDUM OPINION

This action is before the court on plaintiff Norfolk and Western Railway Company's ("N & W") motion for summary judgment on the grounds of federal preemption. The principle issue in this case is whether § 4999.20 of the Ohio Revised Code ("Section 4999.20") is preempted by § 711 of the Regional Rail Reorganization Act of 1973 ("3R Act"), as amended by the Northeast Rail Service Act of 1981 ("NRSA"), 45 U.S.C. § 797j ("Section 711").

N & W contends that § 4999.20 is a state full crew law of the type preempted by § 711, that § 711 applies to N & W's operations in Ohio and that this court has original and exclusive [2] jurisdiction over the interpretation of § 711 pursuant to Section 1152(a) of NRSA, 45 U.S.C. § 1105(a). In its complaint, N & W seeks both an injunction restraining defendants Public Utilities Commission of Ohio, its Chairman and a Commissioner ("PUCO") from enforcing § 4999.20 against N & W and a declaration that § 711 preempts the enforcement of § 4999.20 against N & W. PUCO, on the other hand, argues that interpretation of § 4999.20 is a question of state law and that until it determines that § 4999.20 is applicable to N & W, the issue is not ripe for summary judgment. In addition, PUCO maintains that Congress intended that § 711 preempt state full crew laws only with regard to Conrail. Intervenor, the Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio ("Co-Op"), maintains that § 4999.20 is not the type of statute that § 711 preempts but to the extent that § 711 does preempt § 4999.20, it is a violation of the fifth amendment. For the reasons stated below, the plaintiff's motion for summary judgment is granted.

Background

N & W brought this action in response to commencement of formal proceedings by PUCO to enforce § 4999.20 against N & W. The PUCO proceedings began as a result of letters of complaint directed to PUCO by Co-Op on October 27, 1982 and by the Brotherhood of Railroad Engineers, Ohio Legislative Board ("BLE") on October 30, 1982.[1] The substance of those complaints was that N & W violated § 4999.20 on two occasions by operating trains [3] without

1. Affidavit of Mark D. Perreault, October 31, 1983 ("Perreault Affidavit") at ¶ 3 and Attachments 1 and 2.

a fireman when firemen with seniority dates adequate to invoke the protection of § 4999.20 were available for employment. Section 4999.20, the successor to Ohio's full crew law, provides:

> No railroad employee who has a seniority roster date on the effective date of the repeal of Sections 4999.07 and 4999.08 of the Revised Code shall be removed from his employment or have his seniority rights or vacation or other fringe benefits reduced by reason of such repeal. Any carrier which violates this Section shall be fined not less than $100 nor more than $5,000.00. The Public Utilities Commission shall enforce this Section and prosecute any violations thereof. [Ohio Rev. Code § 4999.20.]

Pursuant to its rules,[2] PUCO investigated the complaints and subsequently held an informal conference among the parties on January 13, 1983, in an attempt to settle the dispute. The parties were "unable to reach agreement" on the complainants' claims that the firemen were entitled to employment on the N & W trains in question.[3]

On January 26, 1983, PUCO issued orders commencing formal proceedings against N & W and ordering N & W to answer the Co-Op [4] and BLE complaints within 15 days.[4] In response to a request for an extension of time

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2. Under Chapter 4907 of the Ohio Revised Code, PUCO is charged with the responsibility of regulating intrastate railroads and of inquiring "into any neglect or violation of the laws of this state by a railroad doing business in this state". *See* Ohio Rev. Code § 4907.08. After conducting an investigation, PUCO must hold a conference in an attempt to informally resolve the dispute. Rule 4901-5-20(A)(1) of the Code of Rules and Regulations of the Public Utilities Commission of Ohio.

3. Perreault Affidavit at ¶ 6 and Attachments 7 and 8.

4. Attachments 9 and 10 to Perrault Affidavit.

by N & W, the time within which to answer was extended until February 25, 1983.[5] N & W filed its complaint in this court on February 25, 1983 and at the same time, filed with PUCO a motion to stay the PUCO proceedings. On March 22, 1983, PUCO filed a motion to dismiss contending that this court did not have jurisdiction over the matter and was without power to enjoin proceedings before PUCO. The court denied PUCO's motion to dismiss on May 25, 1983, finding that PUCO's particular contention with regard to this court's jurisdiction was "plainly wrong." The court did not address the issue of its power to enjoin the PUCO proceedings at that time and the PUCO proceedings continued.

There was no further action in the PUCO proceedings until October 5, 1983, when PUCO denied N & W's motion to stay and ordered the parties to submit briefs addressing the issue of whether PUCO had jurisdiction to proceed in the case. In addition, the parties were directed to discuss ". . . assuming arguendo that the Commission lacks jurisdiction to proceed in this case, whether Section 4999.20, Ohio Revised Code is compatible with pertinent provisions of the 3-R Act and NERSA or whether Section 4999.20 is fatally inconsistent."[6] At the request of the intervenor Co-Op, the date for filing of the briefs before PUCO was extended until January 7, 1984. On November 2, 1983, N & W [5] moved for summary judgment in this court and on December 7, 1983, N & W filed a motion for a preliminary injunction. In response to N & W's motion for a preliminary injunction, this court issued an order on December 22, 1983 in which we stayed the proceedings before PUCO pursuant to § 209(g) of the 3R Act, 45 U.S.C. § 719(g), to preserve this court's original and exclusive

5. Attachment 11 to Perreault Affidavit.

6. Attachment 13 to Perreault Affidavit.

jurisdiction to interpret any provision of NRSA pursuant to § 1152(a) of NRSA.

This case involves the interpretation of § 711 which is titled "Preemption" and provides:

> No State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation, the National Railroad Passenger Corporation, or the Amtrak Commuter Services Corporation to employ any specified number of persons to perform any particular task, function, or operation, or requiring the Corporation to pay protective benefits to employees, and no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to any railroad in the Region. [45 U.S.C. § 797j.]

Discussion

As a preliminary matter, PUCO argues that this case is not ripe for summary judgment because the issue of whether § 4999.20 can be interpreted in a manner consistent with § 711 is one of state law which must be decided by PUCO pursuant to its statutory duties.[7] PUCO maintains that there is no issue upon which this **[6]** court may reach a decision, until PUCO has determined that § 4999.20 is not preempted by § 711 and is applicable to N & W. In support of its argument, PUCO cites to a number of cases involving the doctrine of ripeness as applied to review of administrative agency decisions; these cases are inapposite.

PUCO's ripeness argument overlooks both the nature of this proceeding as well as the express language of NRSA. Section 1152(a) of NRSA provides that: *"Notwith-*

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7. *See* note 2, *supra*.

standing any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action for injunctive, declaratory, or other relief relating to the enforcement, operation, execution or interpretation of *any provision of or amendment . . .*" of NRSA. (Emphasis added). In this case, the court is not asked to review PUCO's interpretation of a state statute or its enforcement decision pursuant to state law. On the contrary, as this court recognized in its order of May 25, 1983 denying PUCO's motion to dismiss and in its order of December 22, 1983 staying the PUCO proceedings until further order of this court, this action involves the interpretation of § 711 and is clearly within this court's original and exclusive jurisdiction pursuant to § 1152(a) of NRSA.

Having determined that this court has jurisdiction to decide this case, we now turn to the pivotal issue—whether § 711 preempts § 4999.20. As a threshold matter, we must determine whether § 4999.20 is a full crew statute of the kind preempted by § 711. N & W maintains § 4999.20 is such a statute and PUCO does not seem to dispute this conclusion. Intervenor Co-Op, however, [7] admits that § 4999.20 is the successor statute to Ohio's full crew law but argues that it simply maintains the employees' seniority rights and vacation and other fringe benefits rather than specifying any particular number of persons to perform any specific tasks as prohibited by § 711.

Co-Op's argument is without merit. Section 4999.20 provides that no employee who has a seniority roster date on the date of the repeal of Ohio's full crew laws[8] "*shall be removed from his employment* or have his seniority rights or vacation or other fringe benefits reduced by reason of

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8. Ohio's full crew laws required a minimum crew of five on freight trains and switch engines. 1919 Ohio Laws Vol. 8, Part I. In 1972, these laws were repealed and replaced with § 4999.20.

such repeal." (Emphasis added). Section 711 prohibits states from continuing in force any law regarding employment of "any specified number of persons to perform any particular task, function, or operation" or which requires payment of "protective benefits to employees." The House Committee Report on a predecessor bill with a provision substantially similar to § 711 states that "[t]he Committee specifically intends to preempt any state full crew laws which require crews to contain certain numbers or certain positions, and *any state laws which phase out such requirements.*" Rail Service Improvement Act of 1981: House Comm. on Energy and Commerce, H.R. Rep. No. 97-153, 97th Cong., 1st Sess. 30 (1981) (emphasis added). The fact that § 4999.20 makes it unlawful for a railroad to remove employees with certain seniority rights from their jobs as well as the fact that it is the successor statute to Ohio's [8] full crew laws makes clear that § 4999.20 is a state law intended to "phase out" the requirements of a state full crew law. As such, § 4999.20 is the type of statute that Congress specifically intended § 711 to preempt.

PUCO argues that, notwithstanding this conclusion, § 711 was enacted to apply solely to Conrail and that Congress' intent was not to preempt state statutes such as § 4999.20 as applied to "profitable railroads." In arguing that § 711 applies to all railroads, N & W relies on the plain language of § 711. The dispute regarding whether § 711 applies to railroads other than Conrail arises from the last clause of § 711. While the first part of § 711 relieves Conrail of the burden of state full crew laws, the final clause duplicates the relief "with respect to *any railroad in the Region.*" (Emphasis added).

The starting point for determining whether a federal statute preempts a state law is to "ascertain Congress' intent in enacting the federal statute at issue." *Shaw*

v. Delta Airlines, Inc., 103 S. Ct. 2890, 2899 (1983). It is a fundamental rule of statutory construction that one is to look first at the language of the statute. *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986, 990 (1983) (citing authorities).

In this case, it is hardly necessary to do more. The language of § 711 is unequivocal. It expressly extends the prohibition against state enforcement of full crew laws to "any railroad in the Region." The term "Region" includes the State of Ohio,[9] and the term "railroad" clearly applies to N & W.[10] Moreover, because the first part of § 711 specifically mentions [9] Conrail, the last clause would be superfluous if Congress did not intend that § 711 apply to railroads other than Conrail.

Ordinarily where, as here, the language of a statute is unambiguous, "it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.'" *Dickerson*, 103 S. Ct. at 990, quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). PUCO asks this court to disregard the plain language of § 711 because, PUCO argues, including profitable railroads within the reach of § 711 is

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9. "Region," as defined by § 102(17) of the 3R Act, "means States of Main, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)." 45 U.S.C. § 702(17).

10. "Railroad" is defined by § 102(15) of the 3R Act as "a common carrier by railroad as defined in section 1(3) of part I of the Interstate Commerce Act (49 U.S.C. 1(3)). The term includes the Corporation and the National Railroad Passenger Corporation." 45 U.S.C. § 702(15). N & W is a common carrier by railroad as defined in 49 U.S.C. § 10102, the successor statute to 49 U.S.C. § 1(3). PUCO incorrectly reads § 102(15) as including only the Corporation and the National Railroad Passenger Corporation; its reading is underinclusive.

inconsistent with the stated purpose of the 3R Act and NRSA, which was to make Conrail economically viable. PUCO argues that by applying § 711 to all railroads, costs would be reduced throughout the industry, thus preventing Conrail from achieving a profitable rail system.

The application of § 711 to § 4999.20 with respect to N & W, as clearly mandated by the language of § 711 is not contrary to **[10]** the purpose of the 3R Act and NRSA. The legislative goal was to give Conrail the opportunity to become profitable, but not necessarily to disadvantage all other railroads at the same time. In fact, Congress has clearly stated that "[a] balanced and competitive transportation system is essential to the entire country" and that activities associated with the railroad reorganization should "not harm the delicate competitive balance of the transportation system of the country." H.R. Rep. No. 97-153, 97th Cong., 1st Sess. 9 (1981).

We have not found nor have we been directed to any legislative history specifically addressing why the last clause of § 711 was added. This absence of legislative history shows no more than, perhaps, that the last clause was added at the eleventh hour. This court is not at liberty to create legislative history where none exists nor to ignore the express language of a statute merely because of a lack of legislative history. What NRSA's legislative history does reflect, however, is Congress' recognition of the problem of overmanning ("particularly in the continued use of fireman [sic]") and of the need for changes in "technologically obsolete" crew consist requirements.[11]

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11. Northeast Rail Service Act of 1981: Hearings on S. 1100 Before the Subcom. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 97th Cong., 1st Sess. 81-82 (1981). Congress' concern was that until railroads were relieved of requirements specifying the minimum number and type of personnel that must be on board every train, operating costs would continue to increase and productivity would be impeded. *Id.*

Moreover, this court as well as the Supreme Court, has recounted the history of the persistent effort on the part of the nation's railroads to **[11]** cut back on unnecessary crew members, including firemen and brakemen.[12]

The Supreme Court has noted that "[p]reemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Shaw*, 103 S. Ct. at 2899, quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, Congress' intent to preempt is explicitly stated in § 711 and this court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Id.* at 2901 (citing authorities). Based upon the foregoing, we perceive no indication that Congress intended that § 711 be given a more restrictive reading than that which we give it in this case. Thus, by holding that § 711 preempts § 4999.20 with respect to N & W, we merely give effect to the unambiguous language of § 711.

Intervenor Co-Op challenges the constitutionality of the last clause of § 711 as violative of both the due process and equal protection components of the fifth amendment.[13] It is important to note at the outset that Congress has authority under the Commerce Clause to "allocate the interlocking economic rights and **[12]** duties

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12. *See United Transportation Union v. Consolidated Rail Corp.* ("*Cannon*"), 535 F. Supp. 697, 710 (Regional Rail Reorg. Ct. 1982), *cert. denied*, 102 S. Ct. 960 (1982), citing *Chicago & N.W. R. Co. v. United Transportation Union*, 402 U.S. 570, 573 (1971) (citing authorities).

13. It appears that Co-Op has abandoned its claim, as alleged in its answer, that § 711 is unconstitutional as against the tenth amendment.

of employers and employees." *Cannon*, 535 F. Supp. at 709 (citing authority).

Co-Op maintains that § 711 violates due process because relieving railroads other than Conrail of the economic burden of state labor protection requirements is not rationally related to the sole objective of the 3R Act and NRSA which was to give Conrail economic advantages. Co-Op errs, however, in assuming that Congress had only one goal when it enacted the 3R Act and NRSA. On the contrary, one of the stated purposes of this legislation was the preservation of "essential rail service" in the Northeast and Midwest regions. 45 U.S.C. § 701. Section 711 is rationally related to that purpose because it promotes the economic well-being of all railroads in the relevant area. Thus, we cannot conclude that when Congress enacted § 711, it "acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Co-Op also argues that § 711 violates equal protection because N & W employees working in the Region are denied the protection of state full crew laws by virtue of § 711 while their counterparts working in states outside of the Region may invoke the benefits of any full crew law their states choose to enact. This court has recognized that "[a]pplication of the equal protection concept to invalidate economic regulation is quite restricted." *Cannon*, 535 F. Supp. at 708. Where, as here, the alleged classification affects no fundamental rights and works no invidious discrimination, the sole duty of a court is to determine that the statute which creates the classification is a "rational [13] way to correct" a perceived problem. *Id.* As we discuss above, § 711 is indeed a rational way to deal with the problem of maintaining essential rail service in the Region. Accordingly, Co-Op's equal protection challenge must also fail.

Conclusion

"It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms." *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development,* 103 S. Ct. 1713, 1722 (1983). This is precisely what Congress did when it enacted § 711; plaintiff is entitled to summary judgment. While a declaration that § 711 preempts enforcement of § 4999.20 against N & W is appropriate, the court does not believe it is necessary at this time to issue an injunction in order to enforce its mandate and dissolves its stay entered December 22, 1983.

/s/ OLIVER GASCH
Presiding Judge

/s/ WILLIAM B. BRYANT
Judge

/s/ CHARLES R. WEINER
Judge

APPENDIX B

Order of Special Court Staying Proceedings Before Public Utilities Commission of Ohio

(Filed December 22, 1983)

C.A. No. 83-2

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
§1152 Panel

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Defendants,

and

THE CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO,
Intervenor.

ORDER STAYING PROCEEDINGS BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

Now before the Court is the motion of plaintiff Norfolk and Western Railway Company ("N&W") for a preliminary injunction. In determining whether to grant the motion the Court has considered the memoranda of the parties and the procedural history of this action. The complaint seeks both an injunction restraining defendant

Public Utilities Commission of Ohio, its Chairman and a Commissioner (collectively "PUCO") from enforcing §4999.20 of the Ohio Revised Code against N&W and a declaration that §711 of the Regional Rail Reorganization Act of 1973 ("RRRA") pre-empts the enforcement of §4999.20 against N&W. On March 22, 1983, PUCO filed a motion to dismiss the complaint arguing that this Court [2] does not have jurisdiction over this matter and that the Court is without power to enjoin proceedings before PUCO. On May 25, 1983, the Court denied PUCO's motion to dismiss, finding that the particular contention of PUCO with regard to this Court's jurisdiction was "plainly wrong". In its order denying the motion to dismiss the Court did not address the question of its power to enjoin proceedings before PUCO and those proceedings have continued. By an entry order dated October 5, 1983, PUCO denied N&W's motion for a stay and ordered the parties to submit simultaneous detailed briefs by November 7, 1983 on

> whether this Commission does or does not, in fact and in law, have the jurisdiction to proceed in the instant matters. Additionally, the parties should discuss, assuming arguendo that the Commission lacks jurisdiction to proceed in this case, whether Section 4999.20, Ohio Revised Code is compatible with pertinent provisions of the 3-R Act and NERSA or whether Section 4999.20 is fatally inconsistent.

At the request of intervenors in this case, The Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio, the date for filing these briefs before PUCO has been extended to January 7, 1984. On November 2, 1983, N&W moved for summary judgment in this Court. That motion has now been fully briefed and will be scheduled for argument in January 1984.

The principal task of the Court in this matter is to interpret §711 which was added to RRRA by §1143 of the Northeast Rail Service Act of 1981 ("NRSA"), Public Law 97-35 (August 13, 1983), 95 Stat. 643. The grant of jurisdiction to interpret any provision of NRSA is found in §1152(a) of NRSA, 42 U.S.C. §1105 (supp.V 1982). That jurisdiction is both original and exclusive. By the very language of §1152(a), no other court or [3] administrative agency has jurisdiction over actions to interpret or implement §711. To preserve this jurisdiction, this Court must now stay the proceedings before PUCO pursuant to §209(g) of RRRA. Although §209(g) does not refer specifically to administrative bodies, the Court has previously concluded that this provision may be invoked to stay proceedings before administrative agencies, state or federal, when necessary to protect its jurisdiction. *Consolidated Rail Corp. v. Pittsburgh and Lake Erie RR Co.*, 459 F.Supp. 1013, 1018-19 (Sp. Ct. RRRA 1978). The Court is presently faced with such a need to protect its jurisdiction and must act to do so. Accordingly,

IT IS ORDERED that PUCO shall stay the proceedings entitled, *In the Matter of the Complaint Against the Norfolk and Western Railway Company Filed by the Co-Operative Legislative Committee*, Case No. 83-113-RR-UNC, and *In the Matter of the Complaint Against the Norfolk and Western Railway Company Filed on Behalf of the Brotherhood of Railway Engineers*, Case No. 83-114-RR-UNC, until the final disposition of this action or further order of this Court.

/s/ OLIVER GASCH
Presiding Judge

/s/ WILLIAM B. BRYANT
Judge

/s/ CHARLES R. WEINER
Judge

Order of Special Court Denying Motion of Public Utilities Commission to Dismiss

(Filed May 25, 1983)

C.A. No. 83-2

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
§1152 Panel

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Defendants,

and

THE CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO,
Intervenor.

ORDER DENYING MOTION OF PUBLIC UTILITIES COMMISSION OF OHIO TO DISMISS

In this action plaintiff Norfolk and Western Railway Company ("N&W") seeks both an injunction restraining defendants Public Utilities Commission of Ohio, its Chairman and a Commissioner ("PUCO") from enforcing §4999.20 of the *Ohio Revised Code* against N&W and a declaration that §711 of the Regional Rail Reorganization Act of 1973, ("RRRA") pre-empts the enforcement of §4999.20 against N&W. Section 711 was added to RRRA by §1143(a) of the Northeast Rail Service Act of 1981 ("NRSA"), Pub. L. No. 97-35 (August 13, 1981),

95 Stat. 643. On March 22, 1983, PUCO filed a motion to dismiss the complaint arguing that this Court does not have jurisdiction over this matter and that the Court is without power to enjoin proceedings before PUCO.

[2] The applicable grant of jurisdiction to the Special Court is to be found in §1152(a) of NRSA. PUCO refers the Court to the West codification of §1152(a) which is found at 45 U.S.C.A. §1105(a) (West Supp. 1982). The West codification speaks of "provision or amendment made by *this chapter*" (emphasis supplied). PUCO contends that since section 711 of RRRA, as codified, appears in chapter 16 (45 U.S.C. §797j) and §1152, as codified, appears in chapter 20 (45 U.S.C. §1105) the interpretation of §711 is beyond this Court's jurisdiction. This position is plainly wrong. Both the text of §1152(a), 95 Stat. 676, and the official codification of that section, 45 U.S.C. §1105 (Supp. V 1982), refer to "provision or amendment made by *this subtitle*." (emphasis supplied). As the reference in text states "this subtitle" is subtitle E, title XI (§§1131-1169) of Pub. L. 97-35 (Aug. 13, 1981), 95 Stat. 643, which is known as NRSA. The provisions of NRSA have been codified in several chapters of the U.S. Code. *See* Short Title note, 45 U.S.C. §1101 (Supp. V 1982). There is no inconsistency between the Statutes at Large and the U.S. Code. In the event such an inconsistency exists, the language found in the Statutes at Large must prevail. *Stephen v. United States*, 319 U.S. 423, 426 (1943). PUCO's reliance on the text of the preliminary West codification is misplaced.

PUCO's other contentions that this Court is without power to enjoin proceedings before a state administrative agency, if correct, would not require dismissal of the complaint. N&W requests both injunctive and declaratory relief. The scope of [3] relief to be granted, if any,

is not a matter for the Court to determine at this stage of the proceedings. There will be ample opportunity for this issue to be more fully briefed at a later date.

Accordingly, for the above reasons, it is this 25th day of May 1983,

ORDERED that defendants' motion to dismiss the complaint be, and hereby is, denied.

/s/ OLIVER GASCH
Presiding Judge

/s/ WILLIAM B. BRYANT
Judge

/s/ CHARLES R. WEINER
Judge

APPENDIX C

Order of Special Court to Be Reviewed

(Filed March 29, 1984)

C.A. No. 83-2

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
§ 1152 Panel

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Defendants,

and

THE CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS AND RAILROAD UNIONS, STATE OF OHIO,
Intervenor.

ORDER

For the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted;

DECLARED that Section 711 of the Regional Rail Reorganization Act of 1973, as amended by the Northeast Rail Service Act of 1981, preempts the enforcement of Section 4999.20 of the Ohio Revised Code against plaintiff Norfolk and Western Railway Company; and

[2] FURTHER ORDERED that plaintiff's request for a permanent injunction is denied and the stay of proceedings before defendants is dissolved.

/s/ OLIVER GASCH
Presiding Judge

/s/ WILLIAM B. BRYANT
Judge

/s/ CHARLES R. WEINER
Judge

APPENDIX D

United States Code

45 § 701. Congressional declaration of policy

(a) Findings

The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act [11 U.S.C.A. § 1 et seq.].

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans for reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) Purposes

It is therefore declared to be the purpose of Congress in this chapter to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to general taxpayer.

45 § 797j. Preemption

No State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation, the National Railroad Passenger Corporation, or the Amtrack Commuter Services Corporation to employ any specified number of persons to perform any particular task, function, or operation, or requiring the Corporation to pay protective benefits to employees, and no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to any railroad in the Region.

45 § 1101. Congressional findings and declarations

The Congress finds and declares that—

(1) the processes set in motion by the Regional Rail Reorganization Act of 1973 have failed to create a self-sustaining railroad system in the Northeast region of the United States and have cost United States taxpayers many billions of dollars over original estimates;

(2) current arrangements for the provision of rail freight and commuter service in the Northeast and Midwest regions of the United States are inadequate to meet the transportation needs of the public and the needs of national security;

(3) although the Federal Government has provided billions of dollars in assistance for Conrail and its employees, the Federal interest in ensuring the flow of interstate commerce through rail service in the private sector has not been achieved, and the protection of interstate commerce requires Federal intervention to preserve essential rail service in the private sector;

(4) the provisions for protection of employees of bankrupt railroads contained in the Regional Rail Reorganization Act of 1973 have resulted in the payment of benefits far in excess of levels anticipated at the time of enactment, have imposed an excessive fiscal burden on the Federal taxpayer, and are now an obstacle to the establishment of improved rail service and continued rail employment in the Northeast region of the United States; and

(5) since holding Conrail liable for employee protection payments would destroy its prospects of becoming a profitable carrier and further injure its employees, an alternative employee protection system must be developed and funded.

45 § 1102. Statement of purpose

It is therefore declared to be the purpose of the Congress in this chapter to provide for—

(1) the removal by a date certain of the Federal Government's obligation to subsidize the freight operations of Conrail;

(2) transfer of Conrail commuter service responsibilities to one or more entities whose principal purpose is the provision of commuter service; and

(3) an orderly return of Conrail freight service to the private sector.

45 § 1103. Goals and objectives

It is the goal of this chapter to provide Conrail the opportunity to become profitable through the achievement of the following objectives:

(1) Nonagreement personnel

(A) Employees who are not subject to collective bargaining agreements (hereafter in this section referred to as "nonagreement personnel") should forego wage increases and benefits in an amount proportionately equivalent to the amount foregone by agreement employees pursuant to paragraph (4) of this section, adjusted annually to reflect inflation.

(B) After May 1, 1981, the number of nonagreement personnel should be reduced proportionately to any reduction in agreement employees (excluding reductions pursuant to the termination program under section 797a of this title).

(2) SUPPLIERS

To facilitate the orderly movement of goods in interstate commerce, materials and services should continue to be available to Conrail, under normal business practices, including the provision of credit and normal financing arrangements.

(3) Shippers

Conrail should utilize the revenue opportunities available to it under the Staggers Rail Act of 1980 and subtitle IV of Title 49.

(4) Agreement employees

(A) Conrail should enter into collective bargaining agreements with its employees which would reduce Conrail's costs in an amount equal to $200,000,000 a year, beginning April 1, 1981, adjusted annually to reflect inflation.

(B) Agreements under this subparagraph may provide for reductions in wage increases and for

changes in fringe benefits common to agreement employees, including vacations and holidays.

(C) The cost reductions required under this subparagraph in the first year of the agreement may be deferred, but the aggregate cost reductions should be no less than an average of $200,000,000 per year for each of the first three one-year periods beginning April 1, 1981.

(D) The amount of cost reductions provided under this paragraph shall be calculated by subtracting the cost of an agreement entered into under this paragraph from (i) the cost that would otherwise result from the application of the national agreement reached by railroad industry and its employees, or (ii) until such national agreement is reached, the cost which the United States Railway Association estimates would result from the application of such a national agreement.

45 § 1105. Judicial review

(a) Special court; exclusive jurisdiction for civil actions

Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this chapter;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this chapter; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this chapter.

(b) Exclusive review by writ of certiorari to the Supreme Court

A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this chapter shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(c) Scope of review of administrative actions

Administrative action under the provisions of or amendments made by this chapter which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2) (A), (B), (C), and (D) of section 706, Title 5. The requirements of this chapter shall constitute the exclusive procedures required by law for such administrative action.

(d) Assignment of additional judges

If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multi-district litigation authorized by section 1407 of Title 28, for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section.

APPENDIX E

Ohio Revised Code

§ 4999.20 Maintenance of employee rights; penalty.

No railroad employee who has a seniority roster date on the effective date of the repeal of sections 4999.07 and 4999.08 of the Revised Code shall be removed from his employment or have his seniority rights or vacation or other fringe benefits reduced by reason of such repeal.

Any carrier which violates this section shall be fined not less than one hundred nor more than five thousand dollars. The public utilities commission shall enforce this section and prosecute any violations thereof.

END OF DOCKET